

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HILBERTO ALONZO

v.

DEPARTMENT OF THE AIR FORCE

Docket No.
DA075209013

ROBERT COEFIELD

v.

DEPARTMENT OF THE NAVY

Docket No.
SF075209012

RUDOLPH D. RUSSELL

v.

DEPARTMENT OF THE INTERIOR

Docket No.
SF075209018

OPINION AND ORDER

By Order of November 13, 1979, the Board reopened these cases to address the issue of whether "good cause" had been shown to justify a waiver of the Board's requirement that appeals must be filed not later than twenty (20) days after the effective date of an appealable action. 5 C.F.R. 1201.22. Each appellant failed to appeal from his removal within the aforementioned 20-day time period. In all three cases, appellants attempted to invoke 5 C.F.R. 1201.12 which provides that a presiding official may waive a Board regulation in an individual case upon a showing of "good cause." In each of the cases, the presiding official found that good cause was not shown to justify a waiver of the time limitation. Accordingly, the appeals were dismissed as untimely filed. The cases were consolidated by the Board upon reopening, since they contain identical or similar issues. 5 C.F.R. 1201.36.

I. FACTUAL BACKGROUND

Appellant Alonzo was removed from his position effective July 16, 1979, and appealed to the Dallas Field Office by letter post-marked August 9, 1979. The appellant stated that his appeal was four days late because he was denied union representation by the refusal of management officials to release an individual to act as his representative. In the initial decision of October 17, 1979, the presiding official noted that the appellant was personally responsible for filing the appeal in a timely manner and that the record failed to establish that the union had no one who could represent the appellant. The presiding official concluded, therefore, that the

explanation offered did not establish that the appellant was prevented by circumstances beyond his control from appealing within the time limit.

By letter postmarked August 20, 1979, appellant Coefield appealed his removal effective April 16, 1979, to the San Francisco Field Office, contending that he was prevented from filing a timely appeal due to various physical and mental conditions. Specifically, he claimed that he had been suffering from severe depression, anxiety, and a somatic condition and that he was unable to deal adequately with his legal and financial affairs. The presiding official, in his initial decision of October 17, 1979, noted that the attempted appeal was more than three months late, but that appellant had contacted and consulted with an Equal Employment Opportunity Counselor and investigator of the agency during the appeal period. Thus, the presiding official concluded that if appellant had been able to visit agency personnel regarding EEO matters pertaining to his employment, there was no reason why appellant could not have sought assistance or filed an appeal on his own behalf. He further found that appellant had not shown circumstances that reasonably prevented him from effectively filing an appeal within the regulatory 20-day limit.

Appellant Russell, who was also removed from his position, filed an appeal one day late, claiming that the delay was caused by poor mail service, and lack of communication between him and his representative because of the distance involved. The presiding official noted that the appellant was properly notified of the time limit and that good cause was not shown for accepting the appeal. Thus, he dismissed the appeal as untimely filed.

II. DISCUSSION

The Board must consider the competing interests involved in deciding when the 20-day time limit should be extended. There are strong policy considerations that employees be given a hearing on the merits of their cases and that they be ensured a fair opportunity to secure from the Board an independent review of agency action. On the other hand, the Board also recognizes that there is a need for finality in personnel actions. In its analysis of the changes in appeals procedures created by the Civil Service Reform Act of 1978, the Senate observed:

The changes protect the right of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case. At the same time, they are intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct,

or whose work performance is unacceptable. (S. Rep. No. 969, 95th Cong., 1st Sess. 51 (1978)).

We agree with OPM (which filed a brief as intervenor) that the time limit affords a system that expedites the administrative resolution of employee appeals and ensures basic fairness. In short, "good cause" is an elastic concept, see *Dinko v. Wall*, 531 F. 2d 68 at 75 (2nd Cir. 1976). It entitles the employee to the application of the broad equitable principles of justice and good conscience.

The Board's regulations include no specific criteria for determining when good cause has been shown for waiving the time limitation on the filing of an appeal. Section 1201.12 of the Board's regulations gives the presiding official wide discretion in determining whether a sufficient basis has been shown by an appellant which warrants a waiver of the time limitation. The presiding official must exercise his judgment in determining whether there has been an articulation or presentation of facts reasonably excusing the failure to file a timely appeal. The particular circumstances of each case must govern the determination of the presiding official. Nonetheless, factors for consideration by a presiding official in deciding whether to waive the 20-day limitation should include, but are not necessarily limited to, the following: the length of the delay; whether appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to comply with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect;¹ a showing of unavoidable casualty or misfortune;² and the extent and nature of the prejudice to the agency which would result from waiver of the time limit.³

If the employee gives a reasonable excuse for the delay, such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing. The appellant need not show an utter impossibility, but only that the delay was excusable in light of the particular facts

¹ Excusable neglect must be based on more than mere forgetfulness. It may be shown if the neglectful behavior is such as might be expected on the part of a reasonably prudent person under the circumstances.

² This can be defined as that which could not have been prevented by the exercise of reasonable skill and diligence or human prudence or foresight.

³ The presiding official should take into account whether the agency's ability to defend its action has been impaired by the failure of the appellant to appeal in a timely fashion. Such matters as the disposal schedule for pertinent documentation and the availability of employees with knowledge of the action are factors to be considered. Likewise, there may be legitimate management considerations mitigating against undertaking the adjudication of a case which the agency reasonably has considered closed.

and attending circumstances where diligence or ordinary prudence has been exercised.

Applying the aforementioned factors and the varying circumstances of each case to be weighed by the presiding official, we shall now consider the explanations offered by the appellants.

Alonzo contended that the delay in filing his appeal was due to the unavailability of his representative. In a written statement, Alonzo claimed that his supervisor had led him to believe that his union representative could no longer represent him once he had received a final agency decision. By the time this confusion was cleared up, the appeal had been delayed four days beyond the time limit. Alonzo, in our judgment, has made a sufficient showing that circumstances beyond his control prevented a timely appeal. Moreover, the agency has not alleged, nor does the record reflect, that it was prejudiced by the short delay in filing.

Russell's letter of appeal to the Field Office was postmarked one day late. His representative claimed that he was contacted by the appellant for assistance on the 19th day of the time limit for appeal. The appeal letter allegedly was prepared and mailed on the 20th day, but, because mail is processed only once a day at the small post office where the appeal was mailed, it was not postmarked until the 21st day. These contentions are un rebutted anywhere in the record. By regulation, the Board has provided that, if the time limit for appeal ends on a weekend or Federal legal holiday, the last day for filing is the following day. 5 C.F.R. 1201.23. The circumstances of this case present an analogous situation. Accordingly, the Board finds that Russell has presented an acceptable reason for his late filing.

Therefore, we find that in the cases of Messrs. Alonzo and Russell, a proper basis for waiver of the time limitation was presented. Thus the presiding officials abused their discretion by not concluding that a reasonable excuse or explanation had been offered for the late filings.

With his letter of appeal, appellant Coefield submitted a letter signed by a psychiatric resident, Veterans Administration Hospital, indicating that the appellant had been seen as an inpatient in July of 1979, and his diagnosis was adjustment disorder with anxious mood, depressed mood, and unspecified physical symptoms. The doctor stated that, in his judgment, the appellant had been unable to adequately deal with the legal and financial affairs of his life from late February 1979, until July 1979. In its response, the agency contended that the appellant had returned to conduct affairs at its Equal Employment Opportunity Office and to meet with an investigator on several occasions throughout that period. This was not denied by the appellant. The agency furnished the

Board a copy of a complaint of discrimination (with the substantive information deleted) which the appellant signed and filed on April 25, 1979, well within his time limit for appeal to the Board.

The record shows that the appeal he filed was three months late and the medical evidence submitted, when considered in light of the appellant's pursuit of an EEO complaint during this period, does not conclusively support a finding that appellant was prevented from appealing because of total or significant incapacitation. We are not persuaded that Coefield was incapable of filing a timely appeal or of authorizing his representative to file the appeal, absent more specific medical testimony. We conclude, therefore, that the presiding official did not abuse his discretion under these circumstances.

Generally, we believe that in cases such as these, any doubt about whether good cause has been shown should be resolved in favor of an appellant. In determining whether the agency was unduly prejudiced by the delay, we have balanced the equities involved, weighing the difficulties of the agency against the benefit to the appellant. See *Shiffler v. Schlesinger*, 548 F.2d 96 (3rd Cir. 1977); *Organizations United for Ecology v. Bell*, 446 F. Supp. 535 (1978). In the cases of Alonzo and Russell, the scale is tipped in their favor; the delays were excusable in light of their brevity and extenuating circumstances. On the other hand, the evidence in the Coefield case simply does not support a finding that for three months appellant was unable to file an appeal. The Board is unable to find that the presiding official abused his discretion in not finding "good cause" to waive the filing deadline in that case.

III. CONCLUSION

Based on the foregoing analysis, the Board concludes that the presiding official in Coefield did not abuse his discretion under 5 C.F.R. 1201.12, in determining that the appeal was not timely filed. Coefield has failed to show good cause for waiving the time limit for filing an appeal. Accordingly, upon reconsideration of the appellate record, the Board AFFIRMS the initial decision of October 17, 1979.

This is the final decision of the Board with respect to appellant Coefield, who is hereby advised that a civil action may be filed in an appropriate U.S. Court of Appeals or the U.S. Court of Claims within thirty days of receipt of this decision.

With regard to appellants Alonzo and Russell, the Board finds that good cause has been shown to justify waiving the Board's 20-day limitation. Accordingly, the initial decisions of October 17 and 19, 1979, are RESCINDED and the cases are REMANDED

for further proceedings. We intimate no opinion as to the ultimate merits of these two appeals.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*